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[Saporito v. Florida Power & Light Co.](#), 93-ERA-23 (ALJ Nov. 12, 1993)

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DATE: NOVEMBER 12, 1993

CASE NO: 93-ERA-0023

In The Matter of

THOMAS J. SAPORITO, JR.
Complainant

v .

FLORIDA POWER & LIGHT COMPANY,
Respondent

Appearances:

THOMAS J. SAPORITO
Pro Se

JAMES S. BRAMNICK, ESQ.
PAUL C. HEIDMANN, ESQ.
For Respondent

Before: E. EARL THOMAS
District Chief Judge

RECOMMENDED DECISION AND ORDER

This proceeding arose under the Energy Reorganization Act of 1974, as amended, (hereinafter "Act") 42 U.S.C. §5851, and the implementing regulations found in 29 Code of Federal Regulations, Part 24. These provisions, commonly known as part of the environmental "whistleblower" provisions, protect employees against discrimination in employment for attempting to implement the purposes of the Energy Reorganization Act and the Atomic Energy Act, as amended, found at 42 U.S.C. §2011 et seq. A hearing was held in Miami, Florida on September 7, 1993. All parties were afforded full opportunity to present evidence and legal argument. The evidentiary record, as finally comprised, consists of the transcript (Tr.), Complainant's exhibits 1-9 (EX), and Respondent's exhibits 1-3 (RX).

STATEMENT OF THE CASE

This case stems from a complaint dated October 21, 1992 by Thomas J. Saporito, Jr. in which he alleges that a telephone call by an unidentified caller from Respondent, Florida Power & Light Co. (hereinafter "FP&L"), was made to warn the Vice President for Nuclear Operations at Arizona Public Service company (hereinafter "APSC") that Saporito was working there. This "one specific act" is alleged to constitute "blacklisting" and to be responsible for the termination of his employment at APSC. See Saporito Complaint, p.8.

The complaint recites Saporito's employment history beginning with FP&L in 1982 as an Instrument Control (I&C) technician. His termination from that position on December 22, 1988 was the subject of discrimination cases heard by Administrative Law Judge Anthony J. Iacobo (Case Nos. 89-ERA-7, 89-ERA-8, June 30, 1989), now pending before the Secretary of Labor. RX 1. Thereafter, he continued to be involved in various activities regarding the operation of FP&L's Turkey Point Nuclear Plant. He petitioned to intervene both individually and through his non-profit organization, Nuclear Energy Accountability Project, in proceedings before the Nuclear Regulatory commission (hereinafter "NRC").

Saporito became an electronics instructor at the ATI Career Training Center in Miami in December, 1989. A letter of inquiry to ATI by FP&L counsel sent in order to verify Saporito's employment as a basis for eligibility in an FP&L licensing proceeding before the NRC was alleged to have been a factor in his termination at ATI on May 10, 1990. The circumstances surrounding that termination were the subject of a proceeding before the undersigned. (Case Nos. 90-ERA-27, 90-ERA-47, November 6, 1990). RX 2. Those matters currently are pending before the Secretary.

Following brief periods of self-employment, Saporito obtained a position as an I&C technician at the APSC Palo Verde nuclear plant through a contract with the Atlanta Group on September 29, 1991. His termination as a contract worker on December 31, 1991 was the subject of a complaint and subsequent hearing before Administrative Law Judge Michael P. Lesniak (Case No. 92-ERA-30, May 10, 1993). CX 2. That matter is pending before the Secretary.

The Wage and Hour Division of the Employment Standards Division of the Department of Labor conducted an investigation of

[PAGE 3]

the facts alleged in the complaint. Complainant was advised by the District Director on February 17, 1993 that the investigation did not substantiate that an official of FP&L actually made the call to APSC or that the intent of the call was to discriminate against him because of his engagement in protected activities. RX 3.

At the beginning of this proceeding, Respondent filed a

motion for summary decision. Ruling on the motion was deferred until Complainant could be given an opportunity to present evidence. In view of the recommended nature of any ruling by the undersigned, Respondent agreed to withdraw the motion and proceed on the merits.

FINDINGS OF FACT

The following facts, among others, were stipulated not to be in dispute:

1. Respondent is an employer within the meaning of the Energy Reorganization Act;
2. Complainant worked for Respondent from March of 1982 until December 22, 1988 as an I&C Specialist at Respondent's Turkey Point Nuclear Power Plant;
3. W.F. Conway was employed by Respondent as Senior Vice President-Nuclear from January 31, 1988 until May 6, 1989, and then became Senior Executive Vice President for Nuclear Operations at APSC's Palo Verde Nuclear Plant;
4. Conway had authority over Respondent's nuclear power plants at Turkey Point and St. Lucie; and
5. FP&L and APSC are not affiliated organizations.

Following his discharge from FP&L on December 22, 1988, which he believed was in retaliation for his whistleblowing activities while employed at the Turkey Point Nuclear Plant, Thomas Saporito was self-employed until he was hired as an Atlanta Group contract employee by APSC on September 29, 1991. Tr. 20-22. At the end of that contracted work, Saporito filed a Section 210 complaint against the Atlanta Group and APSC, alleging that he was not offered employment by them for the next scheduled outage in February, 1992 due to retaliation for having engaged in protected activity while working there. *Id.* CX 2.

[PAGE 4]

The nature of the protected activity in which Saporito was engaged while at APSC Palo Verde is not particularly relevant to this proceeding, but is set forth fully in Judge Lesniak's decision in *Saporito v. Arizona Public Service Company*, Case No. 92-ERA-30, ALJ Dec. May 10, 1993. CX 2. What is relevant is the testimony in that hearing, primarily of three witnesses, James Levine, William Simko, and William Conway, which became the genesis of this litigation.

The decision in *Saporito v. Arizona Public Service Company* was offered as evidence by Complainant and admitted without objection. Judge Lesniak's findings, numbered 338-340, set forth below, are consistent with the other evidence provided in this case and except for a small discrepancy in Levine's

version of "the call", are adopted for purposes of this decision. His references to other paragraphs in his decision have been deleted.

339. James Levine, Vice President of Nuclear Production at PVNGS, who answers only to Bill Conway, Executive Vice President for Nuclear Operations, received a telephone call which had come in for Mr. Conway prior to the Unit 2 outage in the fall of 1991.

Apparently when the person calling found out that Conway was not there, he asked to speak to Levine. The individual stated that he was with Florida Power and Light and told Levine he wanted to inform Conway that he understood Mr. Tom Saporito was working at Palo Verde. Levine was aware that Mr. Conway was a former employee of Florida Power and Light (as Executive vice President for Nuclear Operations) and when Mr. Conway came back to town, Levine gave him the message. At one point, Levine asked through the maintenance organization if they had an employee named Tom Saporito. He believed he called Bill Simko who was the maintenance manager for Unit 2. After Levine asked Simko to find out if Tom Saporito was working at APS, Simko told Levine that there was someone under contract with that name. Levine's direction to Simko was to treat Saporito like every other employee. When Levine talked to Conway about Saporito, he probably asked the significance of the call from the individual. Levine believed that they had a short discussion that Saporito had voiced concerns at Florida Power. Levine had about two or three conversations with Conway about Saporito.

340. William Simko actually reported to Ron Flood who reported to Jim Levine. Simko had conversations about Saporito being previously employed by Florida Power and Light

[PAGE 5]

with Jim Levine and Steve Grove. In approximately September 1991, Simko received a telephone call from Levine who wanted to know if they had hired Saporito. Simko checked with Steven Grove and determined that Saporito had been hired. After advising Levine of Saporito's employment, Levine then asked if Saporito had worked at Florida Power and Light. Simko did not know, so he went back to Steve Grove and found out that Saporito had worked at Florida Power and relayed the information to Levine. Levine said, "Okay, I'll call you back." Several days later, Levine advised Simko that there had been problems at Florida Power with Saporito and that he wanted to make sure that Saporito did a good job for them at Palo Verde. Simko said, "okay." During Simko's career at Palo Verde, (over ten years) he did not remember Mr. Levine ever calling before and asking him to check on someone's background. It was not normal for Levine to directly call Simko since there was a person in between, Mr. Flood.

341. William Conway, Executive Vice President for Nuclear Operations at APS, was also employed by Florida Power and Light company as senior Vice President Nuclear in early February of 1988 and terminated there in early May of 1989.

While Conway was employed at Florida Power and Light, he learned that Saporito's employment was terminated at their Turkey Point Nuclear Station. Conway also knew that Saporito identified safety concerns to NCR and recalled a radio broadcast in March or April of 1989 on the West Palm Beach, Florida, radio station wherein Saporito was interviewed and identified various concerns relative to Turkey Point. Saporito's termination and his safety concerns at Turkey Point were high visibility issues with the news media. Sometime in August or September of 1991, Conway discussed Saporito with James Levine. Levine informed Conway that Saporito was working as an I&C technician for the Unit 2 refueling outage and that Saporito previously worked at Florida Power. Conway acknowledged to Levine that he was aware of Saporito's past employment and may have discussed Saporito's firing from Florida Power. Conway's instructions to Levine were that Saporito was to be treated like anyone else. Conway expected his wishes to more or less trickle down to all employees and believed that Levine would tell other people to treat Saporito the same as everyone else. Conway expected Frank Warriner to receive the communication that Mr. Saporito was to be treated no different from anyone else. Conway wanted this communicated to the lowest level of management, the foreman level. The message was that Saporito had problems at Florida Power and he was terminated and now he's here and Conway wanted him to be treated like everyone

[PAGE 6]
else. CX 2.

The rationale behind Judge Lesniak's decision did not emphasize the telephone call received by Levine, apparently because he found that there was sufficient other opportunity for the alleged APSC discriminating official to learn of protected activity in which Saporito had engaged. However, because that telephone call forms the basis for Saporito's charge of "blacklisting" it will be examined in more detail.

Although Levine says he received the call intended for Conway in August of September, 1991, he did not provide a precise date. Regardless, it was after Saporito had been hired. CX 2, pp.68, 69. Levine believes the caller was from out of town but does not remember his name. The caller wanted to inform Conway that it was his understanding that Saporito was working at Palo Verde. Levine did not say why he believed the caller was from FP&L and did not know his position. CX 3, pp.1002-1008. Levine told DOL investigators that the caller did not mention Saporito's activities at FP&L and did not attempt to "blacklist" Saporito. CX 9.

William Conway was a Senior Nuclear Vice President at FP&L when Saporito was terminated there in 1988. He was aware of Saporito's whistleblowing activities. Tr. 130 and CX 2, p.23. Conway was interviewed at APSC by DOL Wage and Hour investigators. He provided a statement that, to his knowledge, no one at FP&L had ever tried to blacklist Saporito. CX 8.

Saporito's whistleblowing activities at FP&L were well known by many employees at APSC who knew nothing about the phone call. A number of APSC employees had worked with Saporito at FP&L and either knew him or knew of him there. CX 2. APSC Supervisor Groeneveld knew Saporito was fired at FP&L and knew his reputation as a trouble maker. CX 2, p.5. Groeneveld had conversations with ten to fifteen APSC workers about Saporito. Rex Smith had worked with Saporito at FP&L and knew twenty other technicians at APSC who knew Saporito. CX 2, p.6.

Saporito has been interviewed on public television, radio and the print media numerous times about his whistleblowing activities. CX 2, p.37. Complainant exhibit 1 is a collection of over 80 newspaper articles about Saporito. He has written letters to the Presidents of the United States and Russia complaining about the Turkey Point FP&L operation and the U.S. Nuclear Regulatory commission. While at Turkey Point, he filed some 50 labor grievances. CX 2, p.37.

[PAGE 7]

The only testimony at this hearing was provided by Saporito and Jerome Goldberg, who has been President of the Nuclear Division at FP&L since September, 1989. Tr. 30. The Nuclear Division has 2,500 employees. Tr. 83. Goldberg's and Saporito's names sometimes appeared together in the media at the time Saporito was raising concerns at FP&L. Tr. 45.

Goldberg knew Conway before the latter came to work for FP&L, but his familiarity was purely business and contacts between the two were limited to industry meetings. Tr. 43. During the time Saporito was employed by APSC, Goldberg never discussed or mentioned Saporito to Conway. Actually, he did not recall Saporito's name ever being mentioned between them. Tr. 56. He has no knowledge of any FP&L official ever contacting APSC and mentioning Saporito's name.

Saporito testified that during his career in the nuclear industry, he has identified concerns to the Nuclear Regulatory Commission about FP&L, APSC and other nuclear plants in the United States. Tr. 98. He believed that it was well known by Palo Verde employees that he had been fired at Turkey Point. Tr. 123. As a result, he was isolated by his coworkers. They would not sit with him at lunch and asked not to be assigned to work with him. One employee told Saporito that he had seen him on the CNN Network News. During a confrontation, another APSC employee, Bill McCullough pushed Saporito into a security fence. *Id.*

Saporito felt that management at APSC became hostile when he continued to raise safety concerns, but he was not able to link this alleged hostility to any communication from FP&L. Tr. 124. He admitted that he has no evidence as to the identity of the FP&L caller. Nor does he have any evidence that the caller actually worked for FP&L or what the caller's motive was. Tr. 129. Although Saporito alleged that FP&L employees such as Russell Holdren called APSC employee friends, Rex Smith and Mike Farrigan,

he does not know what the intent of the calls was. Tr. 136. Saporito did not identify any FP&L manager or supervisor who called anyone at APSC about him.

Frank Warriner was the APSC Unit I Instrument and Control Technician Supervisor who rejected Saporito's resume and application for contract employment for the Unit I outage at APSC. CX 2, P.41. Although there was no direct evidence in *Saporito v. Arizona Public Service Company* as to Warriner's knowledge of Saporito, Judge Lesniak found that prior to his determinations not to select Saporito, the opportunity existed for Warriner to have

[PAGE 8]

received information that Saporito had engaged in protected activity. CX 2, p.67. After the trial, on August 10, 1993, Conway wrote a letter to Nuclear Regulatory Commission Chief Bobby H. Faulkenberry stating that on August 8, 1993, Warriner admitted to APSC legal counsel that his testimony regarding his knowledge of Saporito's activities and the reasons he gave for not selecting Saporito were not truthful. He had learned of Saporito's protected activity from the Unit II supervisor. However, Warriner indicated that his misconduct was his sole decision and that no one at APSC influenced him not to select Saporito. CX 7.

Although Warriner's discriminatory conduct was the basis for Judge Lesniak's decision, it is not evidence that anyone at FP&L had anything to do with Saporito's termination at APSC. Other than the very limited information provided by Levine's testimony in the *Saporito* hearing, nothing submitted from that record or anything in this one provides any information in addition to Levine's recollection that he received a phone call intended for Conway, the purpose of which was to advise that Saporito worked for APSC.

Because neither Levine's prior testimony nor anything in this record identifies the caller, I cannot find that the caller was in fact an FP&L employee or representative. Consequently, I do not find that the caller was an FP&L supervisor, manager, or agent. Moreover, there is no evidence of the caller's motive, except to alert Conway that APSC had an employee named Saporito.

CONCLUSIONS OF LAW

This case was brought under the Employee Protection Provision of 42 U.S.C. §5851. The statute provides:

No employer, including a Commission licensee, an applicant for a Commission license, or a contractor or a subcontractor of a Commission licensee or applicant, may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee)...

(1) commenced, cause to be commenced, or is about

to commence or cause to be commenced a proceeding under this chapter or the Atomic Energy Act of 1954, as amended [42 U.S.C.A. §2011 et seq.], or a proceeding for the administration or enforcement of

[PAGE 9]

Energy any requirement imposed under this chapter or the Atomic Act of 1954, as amended;

(2) testified or is about to testify in any such proceeding or;

(3) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other manner in such a proceeding or in any other action to carry out the purposes of this chapter or the Atomic Energy Act of 1954, as amended [42 U.S.C.A. §2011 et seq.].

To sustain a discrimination claim under the Whistleblower Protection Provision of the Energy Reorganization Act, the Complainant must prove, by a preponderance of the evidence, that:

(1) the party charged with discrimination is an employer subject to the Act;

(2) the complainant was an employee under the Act;

(3) the complaining employee was discharged or otherwise discriminated against with respect to his or her compensation, terms, conditions, or privileges of employment;

(4) the employee engaged in protected activity;

(5) the employer knew or had knowledge that the employee engaged in protected activity; and

(6) the retaliation against the employee was motivated, at least in part, by the employee's engaging in protected activity.^{1/}

Once the complainant establishes a prima facie case, the burden of proof shifts to the respondent to prove affirmatively that the same decision would have been made even if the employee had not engaged in protected activity.^{2/}

[PAGE 10]

As mentioned above, Respondent stipulated that it is an employer within the meaning of the Act, and that Saporito was an FP&L employee from March of 1982 until December 22, 1988. Even though Saporito would continue to meet the definition of "employee" through his prior FP&L employment,^{3/} his

subsequent employment with APSC easily brings him under the Secretary's broad definition in *Hill v. Tennessee Valley Authority*, 87 ERA 23 and 24 (Sec'y, May 24, 1989).

At least some of the activities in which Saporito engaged, both at FP&L and APSC, were found to have been protected in *Saporito v. Florida Power and Light*, 89 ERA 7 and 17 (ALJ, June 30, 1989), and *Saporito v. Arizona Public Service Company*, 92 ERA 30 (ALJ, May 10, 1993).^{4/} Moreover, there was uncontradicted testimony from Saporito that he had engaged in protected activities at Turkey Point and Palos Verde. Tr. 98. FP&L was aware, through its managers and previous litigation, that Saporito engaged in protected activity.

In order to complete the requirements for a *prima facie* case, Saporito must show, in addition to the above elements, that he was somehow the victim of discrimination or retaliation, as he alleged in this case. In the leading case of *Howard v. Tennessee Valley Authority*, 90-ERA-24 (Sec'y, July 3, 1991), *aff'd sub nom.*, *Howard v. United States Department of Labor*, 959 F.2d 234 (6th Cir. 1992), the Secretary cited Black's Law Dictionary 154 (5th ed. 1979) for the following definition of "blacklist:"

Blacklist. A list of persons marked out for special avoidance, antagonism, or enmity on the part of those who prepare the list or those among whom it is intended to circulate; as where a trades-union "blacklists" workman who refuse to conform to its rules, or where a list of insolvent or untrustworthy persons is published by a commercial agency or mercantile association.

[PAGE 11]

It is not necessary in this case to determine whether or not a single telephone call in which a complainant's name is mentioned, without more, would fall within the above definition. Nor is it necessary to speculate as to the motive of the caller or whether or not it could have been a form of retaliation. The Complainant here has not been able to identify the caller or connect him or her to the Respondent. Levine's recollection that the caller was someone from FP&L is not sufficient identification to charge a company with misconduct. The telephone call could have been made by any one of the plant's 2,500 employees or even a non-employee who may have known or knew of Saporito. For this reason, I conclude that a *prima facie* case against Complainant was not proven.

RECOMMENDED ORDER

Consistent with the foregoing, it is hereby recommended that the complaint of Thomas J. Saporito, Jr. be dismissed.

E. Earl Thomas
District Chief Judge

EET/pc
Ft. Lauderdale, FL

[ENDNOTES]

1/*DeFord v. Secretary of Labor*, 700 F.2d 281, 286 (6th Cir. 1983); *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159, 1162 (9th Cir. 1984); *Ledford v. Baltimore Gas & Electric Co.*, 83 ERA 9, slip op. ALJ at 9 (Nov. 29, 1983), adopted by SOL.

2/*Ashcraft v. University of Cincinnati*, 83 ERA 7, slip op. of SOL at 12-13 (Nov. 1, 1984); *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159, 1164 (9th Cir. 1984); *Consolidated Edison of N.Y., Inc. v. Donovan*, 673 F.2d 61, 62 (2nd Cir. 1982).

3/*Greenwald v. The City of North Miami Beach*, 78-SDW-1 (Sec'y, Apr. 3, 1978), aff'd, *Greenwald v. North Miami Beach*, 587 F.2d 779 (5th Cir. 1979) cert. denied, 44 U.S. 826 (1979).

4/Although the decisions of the administrative law judges are not final, the findings contained therein have been submitted by the parties as evidence and were admitted without objection. See CX 2, RX 1.